85-483

Supreme Court, U.S.
FILED
SEP 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

No.

JESSEL ROTHMAN, P.C.,

Petitioner,

—against—

NEW YORK STATE DEPARTMENT OF TRANSPORTATION,

Respondent.

Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Before a Court of Appeals can impose monetary sanctions against a party's lawyer (pursuant to *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), 28 U.S.C., § 1912, 28 U.S.C. § 1927 and/or F.R. App. P. 38), does the Fifth Amendment's procedural due process requirement necessitate at least clear notice of the court's intention to sanction the lawyer, and/or bifurcation of consideration of the appeal's merits and the proposed sanction, and/or an opportunity for the threatened lawyer to be relieved or to withdraw, and/or some measure of discovery, and/or an evidentiary hearing on genuinely disputed issues of material fact, and/or other procedural safeguards; and do the Sixth and/or Seventh Amendments require a separate trial-type proceeding?

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[1]In the instant case, the United States Court of Appeals cited the five sources referred to above as the combined basis of its power to sanction the parties *and* their lawyers. As will be seen *infra*, it is not possible to ascertain from the court's opinion if all of these were actually relied on by the court to sanction the lawyers, or if only some of them were. Plainly, as will also be seen *infra*, all five can not apply (e.g. *Alyeska*).

PARTIES

The Parties in the Court of Appeals were: In Re Cosmopolitan Aviation Corp., Debtor; Cosmpolitan Aviation Corp., Debtor Appellant; Flushing Savings Bank, Intervenor, Appelle Cross-Appellant; New York State Department of Transportation, Appellee, Appellant, Cross-Appellee; Jessel Rothman, P.C., Petitioner here, was counsel to Flushing Savings Bank below.

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OPINION BELOW

The opinion below (Appendix "D" hereto) is reported at 763 F.2d 507 (2d Cir., 1985), under the title: In Re Cosmopolitan Aviation Corp., Debtor, Cosmopolitan Aviation Corp., Debtor-Appellant, Flushing Savings Bank, Intervenor, Appellee Cross-Appellant, against New York State Department of Transportation, Appellee, Appellant Cross-Appellee.

Jessel Rothman, P.C., Petitioner here, was counsel to Flushing Savings Bank below and seeks Certiorari from this Court to review the Second Circuit's assessment of monetary sanctions against Jessel Rothman, P.C. *qua* Flushing's attorney. This Petition in no way involves the substantive merits of the appeal decided by the United States Court of Appeals for the Second Circuit in the above titled case.

JURISDICTION

The opinion/order of the Court of Appeals was made and entered on May 24, 1985. A timely petition for rehearing was denied on June 27, 1985, and this Petition for a Writ of Certiorari has been filed within 90 days of that date.

The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

The sole Constitutional provisions involved in this case are the due process clause of the Fifth Amendment and the jury trial guarantees of the Sixth and Seventh Amendments.

Also involved are two federal statutes and one federal rule:

> Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs. (28 U.S.C. § 1912).

> Any attorney ... admitted to conduct cases in any court of the United States ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct. (28 U.S.C. § 1927).

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee. (F.R. App. P. 38).

STATEMENT OF THE CASE

Jessel Rothman, P.C., a professional legal corporation of the State of New York (hereafter "Petitioner"), represented Flushing Savings Bank in the United States Court of Appeals for the Second Circuit. The case involved Flushing's status as a lender, a defaulted lease and a bankruptcy proceeding.[1] The appeal was argued by an associate from Petitioner's firm, Julian Kaplan, Esq., About half-way through Mr. Kaplan's oral argument—even though no sanctions had been sought in the bankruptcy court, the district court or any of the three state courts, and the subject had not even arisen in those forums—a member of the Second Circuit panel interrupted with the then out-of-context observation that: "Let me tell you something. You know that your opponents have asked for an award under Section 1927 [of 28 U.S.C.]. That's one of the issues in this case. Remember that."[2] Mr. Kaplan made no response, and simply continued his argument on the merits.

Next came the oral argument of an Assistant Attorney General of the State of New York, Barrie Goldstein, Esq. When she finished, a now-unidentified member of the panel raised the question of attorney's fees and the following ensued:

THE COURT: What about attorney's fees?

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[1]Annexed hereto as Appendices "A" and "B," respectively, in order to provide this Court with some sense of what the appeal concerned (although this Petition has nothing to do with the merits of Petitioner's appeal to the Second Circuit on behalf of Flushing Savings Bank) are the summary of argument from Petitioner's brief-in-chief in the court of appeals and a portion of his unsuccessful petition for rehearing there.

[2]Annexed hereto as Appendix "C" is the title page of the oral argument transcript, page 19 on which the unidentified member of the panel made the statement quoted above, and the "conclusion" portion of Respondent's brief in the court of appeals wherein a fleeting reference is made to the Attorney General's request for attorneys' fees pursuant only to 28 U.S.C. § 1927.

That is what I was going to ask. Talking about that, there has been so much hocus pocus about who represents whom here. The sheet that the courtroom deputy gave me says Bruce Karp for Cosmopolitan wishes to give all of his time to the intervenor, Jessel Rothman, for Flushing, who I understand is out of town.

Your name is what, sir?

MR. KAPLAN: Julian Kaplan. I identified myself as an attorney for Mr. Rothman's office.

THE COURT: Yes, you did. I am not critical of that. I am just saying it's a ticklish situation here.

Your name is what?

MR. KAPLAN: Julian Kaplan. I am an associate of the firm.

Cosmopolitan submitted a one-page statement that they are relying on our brief—

THE COURT: I understand— (inaudible)—but the State says any attorney who so— (inaudible)—and I just want to make sure that this panel is aware of the attorneys who you claim are involved in prolonging this litigation.

We have two here before us this morning, but I am not sure their firms represented Cosmopolitan and Flushing all the way through from the beginning.

MS. GOLDSTEIN: For the pertinent point in time, Your Honor, yes, that is true. Indeed, Your Honor, I would like the Court to be aware that $117,500 has been set aside by the District Court for the potential awards of attorney's fees as well.

THE COURT: Did you move for attorney's fees in the District Court?

MS. GOLDSTEIN: No, Your Honor. I had to come up here first because they appealed the orders. I am prepared to move—

(People talking at once overlapping, inaudible)

THE COURT: Should we remand for an award of attorney's fees against Mr. Rothman and Cosmopolitan or—we—isn't that a matter for trial?

MS. GOLDSTEIN: I would expect that, according to this Court's decisions on fees, and I am familiar with the Court's decisions, but not as familiar as I am with the case law of the Court right now.

I would suggest that we perhaps may need at least some proof to be submitted. My hourly proof, I have been keeping contemporaneous records of that. I would be more than happy to do research and submit a letter memorandum to the Court on that. What we seek right now is the vacatur of this Court's December 20th stay.

THE COURT: Well, we are going to reserve decision, but before we do, I understand that this Court issued a stay pending argument of this appeal; is that correct?

MS. GOLDSTEIN: That's correct, on December 20th, Your Honor.

THE COURT: Well, that stay is hereby vacated.

MS. GOLDSTEIN: Thank you, Your Honor.

THE COURT: We will reserve decision.

MR. KAPLAN: May I be heard in reply on one brief point?

THE COURT: To what do you want to reply?

MR. KAPLAN: The statement that was just made with regards to attorney's fees and Flushing possession is in, quote, "the entire"—(inaudible)

THE COURT: I will give you one minute.

MR. KAPLAN: I would just like to point out as a matter of fact, and this is undeniable, Flushing has only been a party to this proceeding for a grand total of 40 days. During those 40 days, we prepared an appeal, put together an 800-page Joint Appendix, had it printed and filed within ten days, and—

THE COURT: Counsel, are you saying that Flushing hasn't been the moving party behind this entire seven-year episode?

MR. KAPLAN: I am saying that absolutely, Your Honor, and that is a contradiction of Cosmopolitan's conduct to Flushing that puts my client and my firm in jeopardy. In fact, Your Honor—

THE COURT: Let me ask you a question. The principals in Cosmopolitan, since the default began, have been paying money on this debt to Flushing?

MR. KAPLAN: In 1981, personal guarantors, who were sued by Flushing in the State Court and against whom a $600,000 judgment was obtained on personal guaranty, paid payments toward that judgment. That is it.

THE COURT: So Flushing's interest in keeping Cosmopolitan on the airport is a financial interest in

getting payment on their debt, and some of that is being paid out of revenues—of the fixed-base operator?

MR. KAPLAN: No, Your Honor, it was paid personally out of pockets of certain individual guarantors when we obtained a judgment on the personal guaranty.

Flushing never appeared, did not appear or bring any motions in the District Court. It only appeared on two occasions as a creditor—

THE COURT: Those guarantors, were they guarantors for the full amount of the debt?

MR. KAPLAN: Yes.

THE COURT: Well, then why do you care about that?

MR. KAPLAN: Because they are completely financially incapable of paying. They made a few $6,000 payments, I think four or five. In 1981—

THE COURT: What is happening to the revenues of the fixed-base operator right now?

MR. KAPLAN: I don't know. Your Honor, again, I can't answer for Cosmopolitan.

THE COURT: Why are you trying to keep them on the airport?

MR. KAPLAN: I am trying to resurrect a lease because as long as they are in Chapter 11, even if they are liquidated, if that lease is resurrected, a plan can be formed or the lease can be sold and some of the creditors will get paid.

THE COURT: What difference does it make if it is resurrected, whether or not they are in possession or not?

MR. KAPLAN: Your Honor—

THE COURT: If the lease legally can be resurrected, whether they were on the airport or off the airport, it is not going to affect them, is it?

MR. KAPLAN: I think it becomes moot once possession is delivered to MTA.

THE COURT: While litigation is pending over whether or not the lease is—

MR. KAPLAN: Your Honor has just vacated a stay. That means they can put a new tenant in there tomorrow, and I think that a State court—

THE COURT: And a new tenant would be aware that litigation is pending if litigation was pending, would they not?

MR. KAPLAN: A State court would be—

THE COURT: Would you put a lis pendens on a landlord?

MR. KAPLAN: Sure.

THE COURT: I don't think you would call it that—

MR. KAPLAN: I don't know if I can put a lis pendens on, based upon this proceeding. Perhaps I can or perhaps I can't. However, Your Honor, all I am saying is that DOT could have obtained everything from normal State court procedures.

If a State court would have found it to give Cosmopolitan the right to redeem, fine. If they would have been found to waive those rights, fine. That's a determination the State Court should have made at District Court. It went beyond its jurisdiction in stepping on the State Court's jurisdiction.

THE COURT: Who was Mr. Rothman representing when he appeared, moved for a stay in this Court in December?

MR. KAPLAN: Flushing Savings Bank as an intervenor. December 14, 1984, we were granted leave to intervene. That following Tuesday, the 18th, it was Cosmopolitan's motion for a stay in which Flushing joined. Flushing was never a party to any of the Federal court proceedings except as a creditor, other than after its intervention. I ask the Court to take cognizance of that fact, even if it finds us to be delaying and, it's been a grand total of 40 days, that Flushing certainly moved with dispatch in meeting this Court's expedited appeal schedule.

THE COURT: Reserve decision.

The Court of Appeals gave petitioner no other notice or information concerning the subject of sanctions. Indeed, the court itself would later, in its opinion (D-13), note that it only "...directed the parties to file supplemental briefs addressing both the extent of our power to award sanctions against Cosmopolitan, Flushing and their attorneys for bad faith litigation and the best method for calculating the amount." Nothing was said about the possibility or desireability of separating the substantive appeal from the potential sanctions. Petitioner, apparently not realizing that he was at that moment wearing two hats (Flushing's counsel and a potential co-sanctionee), made no effort to withdraw as Flushing's lawyer.

Indeed, when following oral argument, Respondent and Petitioner submitted papers to the court addressing the question of attorney's fees, Petitioner's entire approach was as Flushing's lawyer, and in no way at all as a potential "target" of the court's wrath.[3] Although, in his affidavit opposing the imposition of attorney's fees, Jessel Rothman, Esq., stated that: "If and when the Court identifies any remarks which I made [on the previous application for a stay] that could conceivably serve as the basis for sanctions, I respectfully request that I be given the opportunity to offer a full and complete response to the Court,"[4] no hearing of any kind was ever held about the possible sanctions.

In its opinion/order dated May 24, 1985,[5] the Court of Appeals disposed of the substantive case before it. At the same time, and for the first time, it made the following damning statements:

- "...the frivolous and vexatious character of the appeal brought by Cosmopolitan and Flushing warrants the imposition of sanctions ... against them as well as their attorneys" (D-3);

- the case was "... complicated by the combined machinations of Cosmopolitan and Flushing" (D-4);

- there was "... truly remarkable bad faith evidenced by Cosmopolitan and Flushing throughout this litigation" (D-4);

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[3]Respondent submitted an affidavit by Barrie Goldstein, Esq., dated February 13, 1985, "in response to the request made by the Court at the oral argument on January 23, 1985 to set forth the State's damages caused by appellants' frivolous and vexatious appeal." In response thereto, Petitioner submitted a "Supplemental Brief" and an affidavit of Jessel Rothman, Esq., dated March 13, 1985.

[4]See page 2 of Mr. Rothman's affidavit of March 13, 1985.

[5]Appendix "D" hereto.

- "During the course of these proceedings, Cosmopolitan, Flushing and their attorneys have continually mischaracterized facts, prior proceedings and the law" (D-4);

- the bankruptcy court had "... characterized the entire [bankruptcy] proceeding as an abuse of process..." (D-10);

- "Expressing grave misgivings as to Cosmopolitan's standing to appeal and a strong suspicion of bad faith, [the district judge] ... stayed the bankruptcy court order" (D-11);

- The district judge's order required a bond from Cosmopolitan against sanctions which "might later be 'assessed against Cosmopolitan and its attorneys pursuant to 28 U.S.C. § 1927 upon a determination that Cosmopolitan has engaged in dilitary or vexatious litigation in this matter.' " (D-11);

- the district judge "again expressed [his] ... uneasiness with the proceedings generally, noting that the action appeared to be a misuse of the bankruptcy court." (D-11);

- "...we believe that sanctions against Cosmopolitan, Flushing and their attorneys are appropriate." (D-13);

- "Flushing's second argument is tantamount to a direct affront." (D-17);

- "... the stay would not have been granted had Cosmopolitan and particularly Flushing not completely obfuscated the factual and legal issues. The unnecessary complexity created by Flushing, Cosmopolitan and their attorneys, augmented by mischaracterizations and omissions, misled the panel that granted

the stay. We will not permit the wrongdoers to profit from their contemptible conduct. The December 20 stay cannot buffer them from the consequences of their bad faith." (D-19);

- One of Flushing's claims is "dubious at best" and one of its hopes for relief faces "mindboggling odds." (D-19);

- Flushing's characterization of a state proceeding as for nonpayment "is pure fabrication" (D-20);

- "Flushing's redemption claim is completely frivolous" and another argument is "bizarre." (D-21);

- Flushing's due process argument is "[b]ased on fabrication and fantasy." (D-22);

- "the appeal brought by Cosmopolitan and Flushing is entirely frivolous. It can only have been brought for the purpose of delay. Cosmopolitan, Flushing and their attorneys have acted vexatiously and in bad faith. The attorneys representing Cosmopolitan and Flushing have unreasonably multiplied the proceedings in this case and are guilty of willful abuse of process. The parties and their attorneys should be penalized for unnecessarily wasting our time and resources and the state should be compensated for having been put to the expense of answering these wholly frivolous appeals. *** This Court has been used, as were the bankruptcy court and the district court, to frustrate the rights of the State..." (D-23);

In consequence of the foregoing, the court of appeals assessed "double costs against Cosmopolitan and Flushing" and "reasonable attorneys' fees against Cosmopolitan, Flushing and their attorneys." (D-23);

On remand, the district court was instructed only to assess the amount of the State's attorneys' fees "in this appeal and to assess that amount jointly and severally against Flushing and its attorneys and jointly and severally against Cosmopolitan and its attorneys." (D-23) "...the case is remanded... for the calculation of sanctions." (D24)[5]

In imposing these overall monetary sanctions the court of appeals relied on five separate sources, making no differentiation between the bases for sanctions against the parties and sanctions against their lawyers:

> Our power to award sanctions in this case derives from several sources. Fed. R. App. P. 38 permits us in our discretion to award damages and double costs for the prosecution of a frivolous appeal. The advisory committee note to the rule explains that damages in such a case should be awarded "as a matter of justice to the appellee and as a penalty against appellant. Similarly, 28 U.S.C. 1912 (1982) gives us the discretion to award to a prevailing party damages for delay and double costs. Under 28 U.S.C. § 1927 (1982), "[a]ny attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Finally, where a losing litigant has acted vexatiously or in bad faith, it is within our inherent powers to award attorneys' fees. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975). And if we find willful abuse of process, we may exercise our inherent power to assess

[5]Petitioner understood, and now understands, that the terms of the remand call upon the district court only to perform a mechanical function, not to provide any procedural due process.

attorneys' fees against counsel. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980).

Seeking an opportunity to answer the specific charges made and resolved against him for the first time in the court of appeals opinion, Petitioner filed a timely petition for rehearing. It contended that there was no evidence before the court of appeals that Flushing's appeal was unwarranted, it attempted to demonstrate that the appeal was meritorious, and it asserted that "a rehearing is required in the interests of justice in order that Jessel Rothman, P.C. may have an opportunity to show how its argument and efforts on behalf of Flushing were apparently misunderstood."[6]

On June 27, 1985, rehearing was unanimously denied.[7]

Petitioner now faces an assessment of attorneys' fees which could go as high as $361,260.55.[8]

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[6]By the time of Petitioner's petition for rehearing, Flushing had obtained new counsel. They, too, sought rehearing, and expressly requested "a hearing to review all evidence on the question of improper conduct and to determine which, if any, misrepresentations or mischaracterizations have been made in any papers filed in this proceeding, and to apportion as between Flushing and its former counsel the responsibility for paying such attorneys' fees..."

[7]See Appendix "E" annexed hereto.

[8]See Appendix "F" hereto, the "Conclusion" of Respondent's motion currently pending on remand in the district court concerning the actual amount of attorneys' fees being sought.

REASONS FOR GRANTING THE WRIT

Introduction

Before setting forth Petitioner's reasons why this Court should grant the Petition for a Writ of Certiorari—the importance of the constitutional questions involved, and the implications of those questions for the general administration of justice in the federal courts—it is necessary to make several preliminary points.

Although the court of appeals cited five separate sources as bases for assessing sanctions against Petitioner, two of them seem plainly to be inapplicable. *Alyeska* did not involve sanctions against a lawyer, and thus we consider that case as having no bearing on this case. So, too, is 28 U.S.C. § 1912 inapplicable. First, there is some doubt about whether the section can be used against a lawyer;[9] Second, 28 U.S.C. § 1912 is limited to damages for "delay," and the court of appeals charged Petitioner of much more than that. Third, 28 U.S.C. § 1912 only applies when there is an "affirmance." Here, the court of appeals dismissed and reversed.

In its imposition of sanctions against Petitioner the court of appeals also relied on F.R. App. P. 38, a rule silent on its face concerning *against whom* damages can be assessed. Indeed, most Rule 38 awards are imposed against the opposing *party* not against opposing *counsel.* (See, e.g., *Furbee v. Vantage Press, Inc.*, 464 F.2d 835 (D.C. Cir., 1972); *Fluoro Electric Corp. v. Branford Associates,* 489 F.2d 320 (2 Cir., 1973); *Northcross v. Board of Education,* 489 F.2d 19 (6 Cir., 1973); *cert. den.* 416 U.S. 962; *Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860 (7 Cir., 1974), *cert. den.* 419 U.S. 870, *Reh. den.* 419 U.S. 1027;

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[9]See Robert J. Martineau, "Frivolous Appeals: The Uncertain Federal Response," 1984 *Duke Law Journal* 845, 868 (1984), hereafter cited as "Martineau."

Monroe v. NLRB, 511 F.2d 611 (5 Cir., 1975); *Caesar World, Inc. v. Venus Lounge, Inc.*, 520 F.2d 269 (3 Cir., 1975)).

Moreoever, the Advisory Committee note to Rule 38 cites as the reason for the rule "justice to the appellee and as a penalty against the *appellant.*"[10] So it would appear that the court of appeals was probably in error in utilizing F.R. App. P. 38 as a basis for sanctioning Petitioner *qua* lawyer.[11] That left only *Roadway* and 28 U.S.C. § 1927.

This Court's holding in *Roadway*—that there is inherent power in a federal court to impose attorneys fees against opposing counsel who have abused the processes of the courts, if there is a showing of bad faith after adequate notice and an opportunity to be heard—is limited in two ways which have important meaning for the instant case. First, *Roadway* involved sanctions imposed by a *district* court, and is thus not directly controlling precedent on the question of whether a court of appeals possesses similar power. Second, much of the procedural due process that Petitioner asks this Court to consider requiring the courts of appeals to provide *was provided to the sanctioned lawyers by the district court in Roadway.* (*Monk v. Roadway Express, Inc.*, 73 F.R.D. 411 (1977)). Thus, that much of *Roadway* which opines that "[l]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record" (447 U.S. at 767) is, strictly speaking, only *dicta.*

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[10]F.R. App. P. 38 advisory committee note, reprinted in J. Moore, B. Ward & J. Lucas, Moore's Federal Practice (2d ed. 1973), at 238.01 [Z] and in U.S.C.S. Court Rules (Lawyers Co-Op, 1983).

[11]Even if the court of appeals was correct in invoicing F.R. App. P. 38, however, that would not change the question presented here. Indeed, if F.R. App. P. 38 were arguably yet an additional ground for a court of appeals to impose monetary sanctions against lawyers, there would be that much more of a reason to grant the instant Petition.

Perhaps that is why, until the Second Circuit sanctioned Petitioner in this case, "[n]otwithstanding the clear holding in *Roadway Express*, only once has a federal appeals court relied upon the case as authority for the imposition of a sanction against an attorney for filing a frivolous appeal."[12]

Instead, the courts rely on 28 U.S.C., § 1927, which Congress amended after *Roadway* was decided in order:

> to include attorney fees among the items that could be assessed against counsel pursuant to that section. [footnote omitted] The report of the conference committee managers, specifically addressing the issue of what procedures should be followed in imposing a sanction under the section stated: "The managers intend that judges applying section 1927 will safeguard the rights of an attorney who may be held in violation of the section. Before sanctioning an attorney under section 1927, the court is to afford the attorney *all appropriate protections of due process available under the law*. (H.R. Rep. No. 1234, 96th Cong. 2d Sess. 8, *reprinted in* 1980 U.S. Code Cong. & Ad News 2781, 2783).[13]

Although, unfortunately for Petitioner, the conference committee report failed to spell out what were "all appropriate protections of due process available under the law," the legislators did know all of the procedural due process protection that the district court had provided, and that this Court had tacitly approved, in *Roadway*.

With only that background— *Roadway's* procedures in the district court and what this Court said in its *Roadway* opinion,

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[12]Martineau, at 862.

[13]Martineau, at 874.

and the text of the post-*Roadway* 28 U.S.C. § 1927 amendment, together with that amendment's scant but clear legislative history—when this Court approaches the instant Petition it reads a precedential clean slate.[14]

The Important Questions of Procedural Due Process

1. *The Mathews v. Eldridge Principle*

This Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976)—involving the Fifth Amendment's due process clause, which is invoked in this case—seems to have become the bedrock of all procedural due process inquiries in its enunciation of the principle that "[t]he fundamental requirement of due process is the opportunity [following fair notice] to be heard 'at a meaningful time and in a meaningful manner.' " (424 U.S. at 333). As to that "meaningful time": "A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing." (424 U.S. at 333).

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[14]As to oral hearings in sanction situations, Professor Martineau (at 876, fn 177) reports that "[i]n all of the cases in which federal courts of appeals have considered sanctions for frivolous appeals, the necessity for an oral hearing has never been raised. When the United States Supreme Court in 1983 imposed for the first time in many years a monetary sanction for the taking of a frivolous appeal, it did so without hearing oral argument on the issue. *See Tatum v. Regents*, 103 S. Ct. 3084 (1983)." But see also *Talamini v. Allstate Ins. Co.*, 105 S. Ct. 1824 (1985). There, Allstate sought costs and fees from the appellant, pursuant to this Court's Rule 49, for having to respond to a frivolous appeal. Several things are of interest. First, this Court "afforded appellant the opportunity to respond" (105 S. Ct. 1825). Second, the Chief Justice and Justices Rehnquist and O'Connor would have sanctioned appellant's *attorney*, while still recognizing that "freedom of access to the courts is indeed a cherished value" (105 S. Ct. at 1825). Third, Justices Stevens, Brennan, Marshall and Blackmun declined to impose sanctions, in large part because of the strong value of open access to the courts. They went so far as to perceive a "strong presumption ... against the imposition of sanctions for invoking the processes of the law" (105 S. Ct. at 1828).

Over the years, regardless of whether the interest involved was characterized as "liberty" or "property" (and we view the sanctions imposed on, and derivately visited on, Petitioner as affecting both (see *Goss v. Lopez*, 419 U.S. 565 (1975) and *Board of Regents v. Roth*, 408 U.S. 564 (1972)), this Court's application of the *Mathews* principle (even pre-*Mathews* itself) has fallen into two categories: cases dealing with the "notice" aspect, and others concerned with "opportunity to be heard."

Notice. Perhaps this Court's best modern sum-up of the constitutional necessity for fair notice is found in *Armstrong v. Manzo*, 380 U.S. 545 (1965):[15]

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. [citing cases]" Mullane v. Central Hanover Bank & Tr. Co., 339 U.S. 306, 314. Questions frequently arise as to the adequacy of a particular form of notice in a particular case. [citing cases] But as to the basic requirement of notice itself there can be no doubt....[16]

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[15] *Armstrong*, a state case, involved the due process clause of the Fourteenth Amendment. However, for procedural due process purposes we draw no distinction between that amendment and the Fifth Amendment involved here.

[16] See also *Bradley v. Fisher*, 80 U.S. (13 Wall.) 646 (1871); *Griffin v. Griffin*, 327 U.S. 220 (1946); and *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), where this Court held that: "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." We shall discuss *infra* the potential impact of the court of appeals, sanctions on Petitioner's "good name, reputation, honor and integrity."

In light of these procedural due process notice requirements, there is an extremely important constitutional question presented by the approach taken by the Second Circuit in its sanctions against Petitioner in this case, and taken by other circuits in similar cases: is the lawyer's *intent* and/or *conduct* the measure of the appeal's *merit*, or the measure of the *sanction?* Unfortunately, although many lawyers are being sanctioned and those sanctions are monetarily and professionally quite costly, and although the important constitutional value of fair notice is at stake, no clear answer has been given by the courts of appeals or by this Court. Professor Martineau explains the problem thusly:

> The courts of appeals have often confused two distinct issues. The first issue is whether an appeal should be classified as frivolous because of its lack of merit. [footnote omitted] The second issue is whether, given that an appeal is frivolous on its merits, the conduct of the appellant or the attorney is such that a sanction should be imposed on one or both. [footnote omitted] Often courts determine that an appeal is frivolous by examining the conduct of the appellant or attorney, rather than by looking at the merits of the appeal. [footnote omitted] This conduct is then used as the basis for determining the necessity for the sanction and the type to be imposed. [footnote omitted] This approach causes the courts to vacillate between objective and subjective standards and obscures the extent to which the intent of the appellant or the attorney determines whether an appeal is frivolous.
>
> Even though an appeal does have some merit, it may still be frivolous if the appellant's conduct indicates that his primary purpose is to delay enforcement of the judgment, to cause the appellee to incur unnecessary expense, to be vexatious, or if the conduct otherwise demonstrates bad faith by abuse of the judicial process. There is no case in which a court has found that an

> appeal had merit and yet was conducted in such a way as to call for a frivolous appeal sanction. What the courts have done, however, is to look at the conduct of the appellant as evidence of whether the appeal is without merit and thus frivolous. [footnote omitted] This type of analysis creates confusion. A frivolous appeal should be one that has no merit when viewed objectively and should not be defined by the beliefs or intent of the appellant or attorney.
>
> This does not mean, however, that the conduct of the appellant or the attorney is irrelevant to the frivolous appeal sanction. What it does mean is that the conduct is significant for another purpose—to determine the nature and extent of the sanction to be imposed. This is the real reason the courts look to the conduct and the intent it demonstrates. The more flagrant the conduct, the clearer it is that the intent or motive of the person is culpable and the larger the sanction should be. Thus, the conduct or intent should be the measure of the sanction, not the measure of the merit of the appeal. (Martineau at 870-871).

In other words, it is crucial for lawyers to know whether the more important consideration for sanctions is the lack of merit of the appeal, or the lawyers' motives in bringing the appeal. Yet the courts of appeals seem themselves unclear as to the answer—thereby creating a serious problem of fair notice for potentially sanctionable lawyers. Even worse here is that Petitioner had no notice of any kind whatsoever of either the *jurisdictional bases* of the court's power to sanction Petitioner or of what *behavior* the court of appeals was considering sanctioning him for until *after* it had done so and Petitioner read the court's decision/opinion.

Opportunity to be heard. The corollary to fair notice, indeed the reason for its importance, is the necessity for an opportunity to be heard "at a meaningful time and in a meaningful manner"

(*Armstrong, supra,* at 552). As this Court said in *Fuentes v. Shevin,* 407 U.S. 67, 82 (1972):

> The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing "appropriate" to the nature of the case," Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 313, 70 S. Ct. 652, 657, 94 L.Ed. 865, and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. *E. g.,* Bell v. Burson, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90; Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515; Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287; Armstrong v. Manzo, 380 U.S. at 551, 85 S.Ct., at 1191; Mullane v. Central Hanover Tr. Co., *supra,* 339 U.S. at 313, 70 S.Ct. at 656; Opp Cottn Mills v. Administrator, 312 U.S. 126, 152-153, 61 S.Ct. 524, 535-536, 85 L.Ed. 624; United States v. Illinois Central R. Co., 291 U.S. 457, 463, 54 S.Ct. 471, 473, 478 L.Ed. 909; Londoner v. City & County of Denver, 210 U.S. 373, 385-386, 28 S.Ct. 708, 713-714, 52 L.Ed. 1103. See In re Buffalo, 390 U.S. 544, 550-551, 88 S.Ct. 1222, 1225-1226, 20 L.Ed.2d 117. "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." Boddie v. Connecticut, *supra,* 401 U.S., at 378-379, 91 S.Ct., at 786 (emphasis in original).

Since this right to a pre-deprivation hearing has been applied in such diverse contexts—e.g., prejudgment replevin statutes (*Fuentes*), drivers' license suspensions (*Bell*), "posting" (*Constantino*), adoption (*Armstrong*), suspension from school (*Goss v. Lopez*, 419 U.S. 565 (1975)), parole (*Morrisey v. Brewer*, 408 U.S. 471 (1972)), final local tax assessments (*Londoner v. Denver*, 210 U.S. 373 (1907)), prejudgment wage garnishment (*Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969))—and since the Second Circuit and the few other courts of appeals which have dealt with the matter of sanctions against lawyers, (e.g., *Malhiot v. So. Cal. Retail Clerks Union*, 735 F.2d 1133 (9 Cir., 1984)) apparently believe that no pre-sanction hearing or other opportunity to be heard is necessary, an important constitutional question is presented concerning the application of the *Mathews* "interest" analysis to this situation. In considering this point it is useful to remember that as a predicate to imposing monetary (and, though indirectly, even worse professional/ethical condemnation[17]) on Petitioner, the court of appeals, without a hearing, "convicted" him and/or his client of: bringing a frivolous and vexatious appeal; machinations; bad faith; mischaracterizing facts, law and prior proceedings; abusing process; delaying the case; misusing the bankruptcy court; directly affronting the court; obfuscating the factual and legal issues; creating complexity augmented by mischaracterizations and omissions; making dubious and bizarre claims; fabricating and indulging in fantasy; unreasonably multiplying the proceedings; wasting the court's time and resources; using the federal courts to frustrate the rights of the state; and engaging in contemptible conduct.

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[17]See, e.g., Code of Professional Responsibility, DR 1-102 (A)(4) and (5), 2-109 (A)(2) and 7-102 (A) (5).

It is also useful to remember that in making these findings the court of appeals lumped together the two parties and their two lawyers, all of whom played very different roles; it failed to even acknowledge that the district court had required the posting of a bond against potential sanctions only by Cosmopolitan, not by Flushing, let alone by its counsel, Petitioner here; it did not indicate whether Petitioner was being sanctioned because of proceedings in the state courts and/or the bankruptcy court, and/or in the district court, and/or in the court of appeals on the stay and/or on the appeal itself, although proceedings had been held in all those courts, where no sanctions had been sought or imposed; it made no effort to apportion blame, and thus the sanctions' weight, between the parties and the lawyers, nor between the lawyers, despite the bankruptcy proceeding and much of what followed having been Cosmopolitan's, not Flushing's, affair; it admitted (D-13) that it was addressing the appeal's merits only in order to explain its decision to impose sanctions, yet that discussion of the case's substance in no way supported findings like "bad faith," "dubious" claims, "misusing the bankruptcy court," and much of the rest.

In sum, without revealing the jurisdictional bases of its power to sanction Petitioner, without a hearing where Petitioner could controvert what he was only later charged with, and although apparently entertaining some doubt about its power to sanction (see par 4 on pg. 5, *supra*), the court of appeals, in effect, granted summary judgment against him on a long list of professional derelictions, just as other circuit courts have done to other lawyers. In *Mathews*, in its predecessors, and in its progeny, this Court recognized that only after a careful analysis of the private and public interests involved can procedural due process norms be identified. Because the norm involved here cuts deeply into the

administration of the federal judicial system, an important constitutional question is presented.

2. *28 U.S.C.* § 1927

We pointed out *supra* that when 28 U.S.C. § 1927 was amended to allow monetary sanctions to be imposed against lawyers, it was expressly understood that they would receive "all appropriate protections of due process available under the law." Thus, the important constitutional question is obvious, especially since § 1927 is the basic vehicle for courts of appeal imposing sanctions on lawyers: what procedural due process are they entitled to under the statute? This Court has never answered that question, and doing so would provide every lower federal court in the country with a uniform standard to apply when utilizing an important federal statute.[18]

3. Roadway Express, Inc.

We also pointed out *supra* that because of the very real procedural due process rights afforded the threatened lawyers in the *Roadway* district court, including "fair notice and and opportunity for a hearing on the record" (447 U.S. at 767), the actual holding of the case involves inherent power only *when these rights are present.* Since *Roadway* is frequently, (but, we believe, erroneously) cited for the proposition that such procedural rights are *required,* and since a definitive answer to whether they *really are* is obviously quite important, the instant case provides an oppor-

[18]Subsidiary questions include: (1) whether 28 U.S.C. § 1927 contains an implicit "bad faith" requirement and, if so, the requisite finding could be made without a proper hearing, and (2) whether 28 U.S.C. § 1927 is penal in nature and should thus be strictly construed (*Hagerty v. Succession of Clement,* 749 F.2d 217 (5 Cir., 1984).

tunity for this Court to clarify *Roadway*. So, too, is *Roadway* cited (again erroneously we believe) as applicable to sanctions imposed by a court of appeals, when in *Roadway* the sanctions occurred in the district court. Since quite different considerations exist in each court, and since it is apparently increasingly believed that *Roadway* does not apply to sanctions by a court of appeals[19], the instant case presents an opportunity for this Court to definitively answer these important questions.

4. "Equal Protection of the Laws"

As we stated immediately *supra*, the literal holding of this Court in *Roadway* embraces only federal district courts. Thus, closely related to the above point is the question of whether affording different procedural due process rights to trial versus appellate lawyers could pass muster under that part of the Fifth Amendment's due process clause which has been held to contain "equal protection" content. (See *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

Moreover, other provisions of federal law (e.g., F.R. Civ. P. 37 (g) and 46 (c)) *expressly* allow sanctions to be imposed only *after* a hearing, thereby raising the same "equal protection" question. We do not, at the moment, offer an answer to these questions. We only urge this Court to consider them, since they implicate important constitutional values in the federal judicial system.

The Administration of Justice

Surely no elaboration is necessary to establish that the threat of sanctions can weigh heavily on appellate lawyers and can "chill" their ardor for taking appeals, especially since unlike trial lawyers

[19]Martineau at 874.

there is nowhere they can appeal their sanctions as a matter or right.[20] This is all the more so today "when there are several different sources of authority for imposing a sanction, when there are multiple purposes for the sanction, when varying standards are used in judging whether an appeal is frivolous, when the relationship between frivolous appeal sanctions and abusive litigation tactics is unclear, when the sanction is imposed without notice or an opportunity to be heard, and when the procedure varies for initiating consideration of a sanction."[21]

Sanctioned lawyers face not only substantial money damages (as here). Conducting litigation in bad faith, delaying, filing frivolous appeals and the like is unethical conduct and thus sanctionable professionally as well. (See, e.g., Code of Professional Responsibility, DR 1-102 (A) (4) and (5), 2-109 (A) (2) and 7-102 (A) (5)).

Unless a to-be-sanctioned lawyer can withdraw (which is not easy), there can be a serious conflict of interest and thus a potential malpractice claim. (Here, Petitioner never had an opportunity to withdraw).

Publication of sanctions against a lawyer even in reported decisions—let alone in professional and/or general circulation

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[20]Professor Martineau (at 849) implies that there was an interesting reaction in the press and among attorneys to this Court's award of a mere $500 in *Tatum, supra.* See also *NLRB v. Lucy Ellen,* 517 F.2d 551 (7 Cir., 1975) and *In Re Bithoney,* 486 F.2d 319 (1 Cir., 1973). In *Flaherty v. Flaherty,* 31 Cal. 3d 637, 646 P.2d 179, 183 Cal. Rptr. 508 (1982) Chief Justice Bird extensively assays the lawyers position between the rock and the hard place.

[21]Martineau at 849, footnotes omitted.

newspapers and magazines—can cause irreparable damage to a well-earned, cherished reputation.[22]

A sanctioned lawyer will be burdened in later seeking other bar admissions, public office, a judgeship.

Clients suffer, too; A lawyer even *subject* to unknown and/or unknowable sanctions—let alone a lawyer in Petitioner's shoes, who was threatened with sanctions for the first time in his appellate opponents brief and next by the court itself during actual oral argument of his client's appeal—will necessarily and prudently keep one eye out for his own interests. And at a certain point, those interests may be quite different from those of his client. Indeed, it should be noted that in the instant case Petitioner *still represented Flushing* even while defending itself against the court of appeals' proposed sanctions.

If all of the consequences which flow from today's system of appellate sanctioning of lawyers—financial cost, professional discipline, potential conflicts of interest and malpractice claims, reputational injury, and even court congestion (see the "dissent" in *Talamini, supra*)—are acceptable as a matter of public policy, then this Court should say so. That way, lawyers will know what to expect in the federal appellate courts, and will be able to act accordingly on their own and on their client's behalfs. However, if the consequences are unacceptable as a matter of public policy, all the more reason for this Court to say so—because this problem of sanctioning appellate lawyers is very much a fact of life today in the

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[22]Here, the *New York Law Journal, the* legal newspaper of record for the entire profession in the Greater New York Area, prominently reported, on page 1, what the court of appeals had to say about Petitioner. See Appendix "G" hereto.

federal courts, it is a growing problem, and it is becoming very serious for the administration of justice.[23]

The Sixth and Seventh Amendments

In addition to the court of appeals having, in effect, taken otherwise triable issues of fact and summarily resolved them against Petitioner without much notice and without any hearing or other procedural due process at all, it may also have deprived Petitioner of other constitutional rights.

The Second Circuit has said that a claim is made in "bad faith" when it is (1) entirely without color, and (2) made for reasons of harassment or delay, or for other improper purposes. (*Nemeroff v. Abelson,* 620 F.2d 339, 348-349 (2 Cir., 1980)). According to one commentator,[24] some Courts have suggested that "a request for attorneys' fees under the bad faith exception is really a malicious prosecution suit in disguise..."

If that is so, Petitioner may have possessed a right to a jury trial pursuant to the Seventh Amendment, which has historically guaranteed that procedure in malicious prosecution cases. (See, e.g., *Stewart v. Sonneborn,* 98 U.S. 187 (1879); 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice,* par. 38.11[5] at fn. 12 (2d ed.) 1980)).[25]

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[23]See the bibiliography set forth in the Table of Authorities, *supra,* which demonstrates the considerable professional interest in and concern about the problem of sanctioning lawyers.

[24]Comment, *Nemeroff v. Abelson, Bad Faith, and Awards of Attorneys' Fees,* 128 *U. Pa. L. Rev.* 468, 482 (1979).

[25]Pre-*Roadway,* the Sixth Circuit concluded that federal courts lack inherent power to impose bad faith fee sanctions because to do so would be to render a tort judgment without a jury trial. *Smoot v. Fox,* 353 F.2d 830 (6 Cir., 1965), *cert. den.* sub *Nom. League of Women Voters v. Smoot,* 384 U.S. 909 (1966). Although in *Roadway* this Court decided the inherent power point, the Seventh Amendment point appears to remain open.

Moreover, since some of the court of appeals charges against Petitioner ("mischaracterizations," "machinations," "misuse of the court," "bad faith," "obfuscation," "misleading," "omissions," "contemptible conduct" and the like) can be considered tantamount to a charge of criminal contempt (See *Skinner v. White*, 505 F.2d 685 (5 Cir., 1974), since the actual dollar cost of the sanctions imposed on Petitioner could go as high as $361,260.55, and since this Court in *Muniz v. Hoffman*, 422 U.S. 454 (1975) reserved the question of whether an individual facing criminal contempt and the possibility of a substantial fine would be entitled to a jury trial,[26] Petitioner may have possessed the right to a jury trial pursuant to the Sixth Amendment.

In sum, the monetary sanction imposed on Petitioner by the court of appeals could be deemed to be at least the practical equivalent of both a punitive fine for criminal contempt and a tort judgment for malicious prosecution, actions for which the Sixth and Seventh Amendments require jury trials. These questions, too, are important for the reasons set forth *supra*—because they raise important issues of federal constitutional law and of public policy properly addressed by the supervisory power of this Court.[27]

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[26]At least two courts of appeals have answered in the affirmative: *Girard v. Goins*, 575 F.2d 160 (8 Cir., 1978) and *Douglass v. First National Realty Corp.*, 543 F.2d 894 (D.C. Cir., 1976).

[27]It is interesting to note that both federal contempt powers—18 U.S.C. § 401 and F.R. Crim. P. 42—allow a summary finding of contempt only when the conduct to be punished occurs in open court and in the immediate view of the judge, and even then only if the contempt finding is necessary to protect the dignity of the court, *(Johnson v. Mississippi*, 403 U.S. 212 (1971)).

CONCLUSION

In a recent report—"Procedural Rights of Attorneys Facing Sanctions"—the Committee on Federal Courts of the Association of the Bar of the City of New York made a strongly worded recommendation which serves as a perfect note on which to conclude this Petition for a Writ of Certiorari:

> In the face of [the] ... rapid expansion of the authority for and use of sanctions, there has been relatively little consideration given to the procedural guarantees which must accompany the imposition of sanctions.
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> ***
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> It is imperative, in our view, that Bench and Bar undertake a prompt and searching inquiry into the procedural safeguards which must be observed prior to the imposition of sanctions.[28]

Petitioner would add only that this Court could, and should, take the lead in that "searching inquiry" by granting this Petition for a Writ of Certiorari.

Submitted by,

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September 16, 1985

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[28]The Record of the Association of the Bar of the City of New York, p. 313, 314 (1985).

APPENDIX "A"

SUMMARY OF ARGUMENT

Both appellants had rights and remedies available to them individually and jointly under State Law to remedy any defaults declared by the State Court under a lease dated October 5, 1975.

By its order of April 10, 1984, as affirmed on appeal by the District Court on December 7, 1984, the Federal Judicial system precluded Flushing Savings Bank and Cosmopolitan Aviation Corp. from exercising their rights and remedies under State Law.

Both the Bankruptcy Court, and through affirmance the District Court violated 28 U.S.C. 1481 in permitting said orders to remain effective and further, to the extent the Bankruptcy Court, as affirmed by the District Court had discretion to exercise equitable powers under 11 U.S.C. § 105(a), they abused said discretion.

It was in the interest of creditors of Cosmopolitan Aviation Corp. and Cosmopolitan Aviation Corp. itself, that the *status quo* created by 11 U.S.C. § 362(a) should have remained in effect until Flushing Savings Bank completed the appellate process in the State Courts.

The conduct of the State agencies, to wit, the Department of Transportation (DOT) and its predecessor in interest Metropolitan Transportation Authority (MTA), when taken in its totality in both the State Court and the Federal Court, constituted a denial to Flushing Savings Bank of procedural due process in violation of the 14th Amendment of the United States Constitution.

APPENDIX "B"

Towards this legitimate end of prevailing on the appeal Jessel Rothman, P.C., on behalf of Flushing, made, at the very least, a good faith argument. In hindsight we realize that Flushing's main argument may have been obscured by the prolixity believed necessary to fully set forth Flushing's contention. Nonetheless, it was there.

Flushing's basic argument was that the Bankruptcy Court should have abstained from awarding possession of the property to the Department of Transportation until the New York State courts passed on the merits of Flushing's arguments that under New York State law, the lease between Cosmopolitan and the State should be resurrected. Flushing sought to support this argument by describing its state law arguments to this Court. It is respectfully submitted that both facets of this argument were colorable.

Flushing's "abstention" argument was most strongly supported by 11 U.S.C. § 105(a) which has been construed to provide that an order awarding possession of leased premises should only be granted pursuant to 11 U.S.C. § 105(a) under the *extraordinary and compelling circumstances.* This proposition is grounded on the belief that comity dictates that, generally speaking, state courts should determine issues respecting the possession of real property.

This Court has found that the facts of this case warranted a finding that extraordinary and compelling circumstances did exist to justify the April 10, 1984 Order by the Bankruptcy Court. While Rothman does not agree with that finding, he is *not* contesting it in this petition. However, Rothman respectfully disputes the Court's further finding that Rothman's argument that this case did not fall into an exceptional category was frivolous. As noted in its previous submissions to the Court on behalf of Flushing, the case law

construing 11 U.S.C. § 105(1) [sic] and the judicial gloss placed on that statute was scant, to say the least. There was no legal authority which clearly defined—and thus put Mr. Rothman on notice—as to which situations fell into the *exceptional* category of "extraordinary and compelling circumstances." It is respectfully submitted that penalizing Mr. Rothman for arguing that this case did not fall into an undefined exceptional category is unduly harsh.

As the Court noted, this abstention argument is ultimately premised on the proposition that Flushing had state law rights with respect to the property that could be protected in state court. This Court, concluded that Flushing did not possess such rights (pp. 20-23) and bolstered this finding by noting that "Flushing has been unable to convince any court so far that it has a possessory interest in the premises" (p. 23). With respect to the latter finding, it appears that the Court is under the misapprehension that, prior to Flushing's appeal, state courts held on the merits that Flushing had no interest with respect to the property. Quite simply, that is not the case. Thus far, none of the adverse decisions issued by the state courts have dealt with Flushing's substantive rights respecting the property. Rather these determinations barring Flushing's intervention in the state court proceeding—to the extent they were explained—were apparently premised solely on procedural considerations.

Flushing's argument on the merits, if it had the opportunity to make it, would have proceeded as follows:

The actual "courtroom" experience of Jessel Rothman, P.C., is that the Landlord-Tenant Courts in the State of New York have frequently exercised unbounded discretion in situations where tenants have defaulted and judgments have been entered and warrants issued.

The power of a Court to exercise such discretion in this case would derive from both common law and statute—New York Real Property Actions and Proceedings Law, (NYRPAPL) § 749(3), as well as pre-existing case law—which provide that a warrant can be vacated and the lease resurrected.

In *Jones v. Gianferante,* 305 N.Y. 135, 11 N.E.2d 419 (1953), the New York State Court of Appeals expressed its approval of the Appellate Division's giving

> the tenant the benefit of the rule or practice in equity which relieves against...forfeitures of valuable lease terms when default in notice has not prejudiced the landlord, and has resulted from honest mistake, or similar excusable fault.
>
> *Id.* at 138.

Although the facts in *Jones, supra,* are not the same as in the case at bar, a Landlord-Tenant Court could, on the basis of basic proposition set forth therein, find that Flushing, as assignee, (who was not a party in the Landlord-Tenant proceeding) be afforded the opportunity to cure all defaults and take the resurrected lease, and assign it for value, so that it could recoup its investment, (used to construct the valuable building on the property) *as long* as it then made the Landlord *whole.*

The firm believed in the basis of its extensive experience in landlord/tenant matters that Landlord-Tenant Courts would strain to avoid an absolute forfeiture where:

1. The tenant or someone on its behalf tenders enough money to make the Landlord *whole.*
2. The lease is a valuable commercial lease which if lost will cause the tenant, or a mortgagee/assignee the

complete and unrecoupable loss of its business or investment.

3. The forfeiture of the lease will simultaneously give the landlord a substantial windfall in that it may re-rent the premises for a substantially higher rent than that under the terminated lease.

Were Flushing to reappear in State Court, it was counsel's belief that it could—not necessarily would, but *could*—establish this three-part predicate:

We believed that under this *scenario* there was a reasonable chance that a Landlord-Tenant court would reinstate the lease if it found any colorable statutory authority to do so. The firm believed it had both, and further felt that Judge Mishler's Order of December 7, 1984, prejudiced, if not destroyed, the chances of the above occurring:

The major obstacle, of course, was the warrant, dated June 2, 1982, since the issuance of a warrant annuls the relation of landlord and tenant. (NYRPAPL § 749 subd. 3). That very same statute, however, gives the Court the power to vacate the warrant "for good cause shown", at any time prior to its execution. NYRPAPL § 749 sub.3. In fact, it was a fairly recent (1975) amendment to the statute which codified the pre-1975 case law to extend the Court's power to permit it to vacate not only a pre-warrant default, but the warrant itself after it was issued. *See, e.g. Novick v. Hall,* 70 Misc.2d 641, 334 N.Y.2d 698, (Civil Ct. of the City of N.Y., N.Y. County, Trial Term Part 49, 19720. In *Novick, supra,* once the Court found that it had the power to vacate the warrant by comparing the innocent landlord's potential prejudice to the hardship of the party seeking to vacate the warrant.

Counsel, in good faith, believed that a Landlord/Tenant Court in this matter could be induced to consider the relative hardships to

Flushing and the landlord upon an application by Flushing to vacate the warrant upon a tender of all sums due the landlord:

IF WARRANT IS NOT VACATED

Flushing loses its only security for $500,000 loan to a now defunct corporation.

Landlord relets premises for 5 to 10 times the monthly rental in the Cosmopolitan lease.

IF WARRANT IS VACATED

Flushing may recoup most or all of its investment.

Landlord is made current for all arrears, costs, expenses.

On the basis of these facts and NYRPAPL § 749(3) and its common law antecedents, counsel believed, in good faith, that Flushing was *not* foreclosed from some form of success in the state courts, as long as there had been no execution of the warrant and Cosmopolitan was still in possession.

RPAPL § 751(1) is only one of the available procedure for Flushing in the event the Landlord/Tenant Court is inclined to vacate the warrant under RPAPL § 749(3). Flushing's inadvertant (but now apparent) heavy reliance on 6751(1) may have given this Court the notion that Flushing believed that RPAPL § 751(1) was the only way it could succeed in State Court if it vacated the warrant pursuant to § 749(3). Perhaps the Court, then finding that RPAPL § 751(1) was not available to Flushing, felt that there

We believed that if the Landlord/Tenant Court exercised its power to vacate the warrant, Flushing could have been given an opportunity, either on its own, through Cosmopolitan's trustee, or otherwise, to cure the defaults, make the landlord whole and take possession. In every case where the warrant was vacated pursuant to NYRPAPL §749(3), the lease was reinstated, and *not* always by the statutory vehicle redemption of NYRPAPL § 751(1), but frequently in the discretion of the Landlord/Tenant Court.

Thus, in pursuing an avenue by which counsel sought to protect the rights of its client, Flushing's counsel asked itself not whether the Landlord-Tenant Court could necessarily be statutorily and unequivocally *compelled* to vacate the warrant and resurrect the lease, but whether the Landlord-Tenant Court might be inclined to permit such resurrection if the Landlord were made whole, and if there was one or more reasonable statutory processes which the Landlord-Tenant Court, if so inclined, could follow to accomplish the resurrection of the lease, thus enabling Flushing to recoup its investment.

It also appeared to counsel that the warrant could be vacated upon dismissal of the original Landlord-Tenant proceeding under CPLR 3211(a)(10), for absence of a necessary party. As appears from CPLR 3211(e), subdivision (10) is one of the three subdivisions of CPLR 3211(a) which is *never* waived. It can be raised any time, even on or after appeal, and by any party (even if not raised below) or by the Court. *Figari v. New York Telephone Company*, 32 A.D.2d 434, 303 N.Y.S.2d 245, (2d Dept., 1969).

It was certainly reasonable to submit to a State Court that at the time of the trial of this action when the issues of whether the defaults MTA alleged were litigated—the very defaults which MTA claimed Flushing lost its right to possession by failing to cure within 30 days—Flushing was a necessary party under CPLR

3211(a)(10).

If Flushing were successful on that issue, the judgment of eviction, and of course, the warrant, would be vacated, *ab initio*, as the complaint would be dismissed. CPLR 3211(a)(10); *Figari v. New York Telephone, supra.*

As counsel was seeking only to protect whatever chances Flushing had in State Court to recoup its investment by asking a Landlord-Tenant Court to vacate the warrant either under:

(a) RPAPL § 749 subd. (3);

(b) CPLR 3211(a)(10); or

(c) the theory that the entry of the judgment exceeded the limited power granted

the Landlord-Tenant Court by the order vacating the automatic stay, when it learned of the Order of Judge Mishler, which completely by-passed the State Court by ordering delivery of possession by the United States Marshall, Flushing had to appeal that order because it directly prejudiced Flushing. It *virtually*, if not absolutely, assured that none of the scenarios described above would take place.

Although theoretically the harm might not be literally "irreparable", (in that if Cosmopolitan's Lease were resurrected, any new tenant could be ousted, having taken possession subject to Cosmpolitan's rights) in the "real world", it would be so much more difficult for Flushing to induce a Landlord-Tenant Court to resurrect a lease where there is a new (ostensibly innocent) tenant in possession and operating a business, than it would be for Flushing to induce resurrection of Cosmopolitan's lease with Cosmopolitan in possession.

Effectively, as a result of the then imminent ramifications of Judge Mishler's Order, no longer could the Landlord-Tenant Court reconcile a resurrection of the lease on the ground that the Landlord is made whole and that no one would be hurt. There would be a new tenant who would necessarily have to suffer if the Landlord-Tenant Court is to vacate the warrant and resurrect the lease.

For example, in *Oppenheim v. Spike*, 107 Misc.2d 55, 427 N.Y.S. 2d 826 (App. Term, 1st Dept. 1980) where the Court found an unequivocal "right and power of the Court to restore a wrongfully removed tenant to possesion of a premises, even after the execution of a warrant under proper circumstances," it refused to put the tenant back into possession where another tenant had taken possession.

Although the Court left the parties to the remedy of money damages for wrongful eviction, this would be a more difficult process for Flushing herein, and counsel had good reason to try to preserve Flushing's ability to obtain possession, if possible, as a shorter, more expeditious and less costly process than trying to oust a new tenant or to proceed to determine monetary damages.

Therefore, Flushing was within all the perspectives of the reality of Landlord-Tenant Courts, and the discretion exercised in such courts, severely prejudiced by the Order of Judge Mishler and the appeal therefrom—as well as the application for the stay—was taken in good faith, and solely to try to preserve Flushing's position—whatever it may have been—in the State Courts.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re:
COSMOPOLITAN AVIATION CORP.,

Debtor,

—against—

NEW YORK STATE DEPARTMENT
OF TRANSPORTATION,

Appellee.

Oral Argument held at
U.S. Court of Appeals for the 2nd Circuit
The United States Courthouse
40 Centre Street
New York, New York
January 23, 1985
BEFORE: ELLSWORTH A. VAN GRAAFEILAND,
THOMAS J. MESKILL,
RALPH K. WINTER,
Circuit Judges

***

THE COURT: Did you go to the Court of Appeals on that?

MR. KAPLAN: No, Your Honor. We were presently waiting for a decision from the Appellate Term.

THE COURT: You never argued an appeal in the New York Cout of Appeals on behalf of Flushing?

MR. KAPLAN: Yes, Your Honor, we did.

THE COURT: Then why are you saying you didn't?

MR. KAPLAN: Because it was a different appeal. We first moved to intervene—

THE COURT: Let me tell you something. You know that your opponents have asked for an award under Section 1927. That's one of the issues in this case. Remember that.

MR. KAPLAN: May I clarify this point because there is a vital distinction. Because of Cosmopolitan's judgment, the landlord-tenant judgment was on appeal, we moved to intervene at the appellate level. That was denied. We went to the Court of Appeals, and the Court of Appeals affirmed that denial and said that it

CONCLUSION

For all of the above reasons, this Court should affirm the district court order awarding the premises to the State and award the State attorney's fees pursuant to 28 U.S.C. § 1927.

Dated: New York, New York
January 14, 1985

Respectfully submitted,
ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellee
the New York State
Department of Transportation

LITIGATION BUREAU:
RICHARD G. LISKOV
BARRIE L. GOLDSTEIN
Assistant Attorneys General

Of Counsel

APPENDIX "D"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 794 — August Term, 1984

(Argued: January 23, 1985 Decided: May 24, 1985)

Docket Nos. 84-5121, 85-5005, 85-5007

IN RE COSMOPOLITAN AVIATION CORP.,
Debtor.

COSMOPOLITAN AVIATION CORP.,
Debtor-Appellant,

FLUSHING SAVINGS BANK,
Intervenor, Appellee Cross-Appellant,

v.

NEW YORK STATE DEPARTMENT OF TRANSPORTATION,
Appellee, Appellant Cross-Appellee.

Before:

VAN GRAAFEILAND, MESKILL and WINTER, *Circuit Judges.*

Cosmopolitan Aviation Corporation and Flushing Savings Bank appeal from an order of the United States District Court for the Eastern District of New York, Mishler, *J.*, which affirmed an order of the United States Bankruptcy Court for the Eastern District of New York, Parente, *J.*, directing Cosmopolitan Aviation Corporation

to turn over to the New York State Department of Transportation possession of certain premises. The State appeals from an order of the United States District Court for the Eastern District of New York, Altimari, *J.*, which granted Flushing Savings Bank's motion for an extension of time in which to file a notice of appeal from Judge Mishler's order.

Appeal of Judge Mishler's order dismissed as to both Cosmopolitan Aviation Corporation and Flushing Savings Bank. Judge Altimari's order reversed. Double costs and attorneys' fees assessed jointly and severally against Cosmopolitan Aviation Corporation and its attorneys and against Flushing Savings Bank and its attorneys. Remanded to the district court for the calculation of attorneys' fees.

BRUCE O. KARP, New York, New York (Abraham Backenroth, Harvis & Zeichner, New York City, of counsel), *for Appellant Cosmopolitan Aviation Corp.*

JULIAN KAPLAN, Mineola, New York (Jessel Rothman, Lisa J. Rinaldi, Mineola, New York, of counsel), *for Intervenor Flushing Savings Bank.*

BARRIE L. GOLDSTEIN, Assistant Attorney General, State of New York (Robert Abrams, Attorney General, Richard G. Liskov, Assistant Attorney General, State of New York, New York City, of counsel), *for Appellee New York State Department of Transportation.*

MESKILL, *Circuit Judge*:

Cosmopolitan Aviation Corporation (Cosmopolitan) and Flushing Savings Bank (Flushing) appeal from an order entered in the United States District Court for the Eastern District of New York, Mishler, *J.*, which affirmed an order of the United States Bankruptcy Court for the Eastern District of New York, Parente, *J.*, directing Cosmopolitan to turn over possession of certain premises at Republic Airport in Farmingdale, New York to the New York State Department of Transportation (State). The State appeals from an order entered in the United States District Court for the Eastern District of New York, Altimari, *J.*, which extended the time, pursuant to Fed. R. App. P. 4(a)(5), for Flushing to file a notice of appeal from Judge Mishler's order.

We hold that Cosmopolitan is without standing to appeal the bankruptcy court order. We also hold that the trial judge abused his discretion in granting Flushing an extension and, therefore, that Flushing failed to file a timely notice of appeal. Accordingly, we reverse the order granting Flushing an extension and we dismiss this appeal as to both Cosmopolitan and Flushing. Furthermore, the frivolous and vexatious character of the appeal brought by Cosmopolitan and Flushing warrants the imposition of sanctions in the form of double costs and attorneys' fees against them as well as against their attorneys. We intend the award of fees in favor of the State to be in the nature of compensatory damages. Therefore, we remand this action to the district court and instruct that court to ascertain the amount of the State's reasonable attorneys' fees and to assess that amount jointly and severally against Flushing and its attorneys and jointly and severally against Cosmopolitan and its attorneys to

compensate the State for the cost of defending against this action in the federal courts.

BACKGROUND

This case began as a simple dispute between the State as landlord, and its tenant, Cosmopolitan.[1] It has, however, been inordinately complicated by the combined machinations of Cosmopolitan and Flushing. The dispute and the legal issues raised do not warrant the space necessary to convey adequately the truly remarkable bad faith evidenced by Cosmopolitan and Flushing throughout this litigation. During the course of these proceedings, Cosmopolitan, Flushing and their attorneys have continually mischaracterized facts, prior proceedings and the law. It has been no mean task to pick through the voluminous record only to find that the State's presentation has been essentially and consistently unbiased and balanced, in complete contrast to the actions of Cosmopolitan and Flushing.

In October 1975, Cosmopolitan entered into a lease under which it took possession of approximately forty acres at Republic Airport, a general aviation facility in Farmingdale owned by the State. The lease was for a term of fifteen years, from October 1975 to October 1990, with an option to renew for ten years. In addition to requiring monthly payment of a base rent and a percentage of revenue, the lease obligated Cosmopolitan, *inter alia*, to construct a hangar within a specified time limit

[1] The original lessor was the New York Metropolitan Transportation Authority (MTA). In June 1982, the New York legislature transferred ownership of Republic from the MTA to the New York Department of Transportation. The identity of the actual owner/lessor at any particular time is of no consequence to this appeal. Hence we refer to the State throughout as the lessor.

and in accordance with plans approved in advance by the State, to request and receive written approval prior to conducting air taxi or charter operations, to keep and maintain accurate books and records of its operations at the airport and to make those books and records as well as certified financial statements, external audits and income tax returns available to the State.

The lease also provided that if Cosmopolitan were to continue in default of any or all of its obligations for thirty days after written notice of default from the lessor, the State could terminate the agreement on five days written notice. In the event of such termination, the lessor was obligated to pay to Cosmopolitan, after deducting all amounts due to the State as lessor, an amount equal to the cost of improvements made by the lessee in accordance with the terms and conditions of the lease (the buy-back provision).

In or about September 1976, the State consented in writing to Cosmopolitan's mortgage and assignment of its interest in the lease to Flushing. The consent outlined the conditions Flushing would have to satisfy before it would be entitled to take possession of the premises: it would have to cure any defaults; it would have to do so within the period permitted under the lease, *i.e.*, within thirty days following notice of default, and it would have to obtain the consent of the State which would not unreasonably be withheld.

In late 1977 and 1978, Cosmopolitan defaulted on all of its previously listed obligations. Attempts at informal resolution having proved unavailing, the State served on Cosmopolitan, with a copy to Flushing, a notice of default dated June 11, 1979. The defaults remained uncured. Flushing took no timely action to satisfy any of the

conditions required before it could take possession of the premises. In August 1979, the State notified Cosmopolitan in writing, with a copy to Flushing, that the lease would terminate on September 5, 1979 and that Cosmopolitan should surrender the premises on that date. Cosmopolitan refused to comply. Consequently, the State instituted a summary proceeding in the state District Court of the County of Suffolk, Second District to recover possession. The State did not notify Flushing of the suit.

Trial began in June 1981 and progressed slowly and sporadically. Nine trial days later, in August 1981, Cosmopolitan began its defense case. On August 11, 1981, Cosmopolitan filed a Chapter 11 petition in the United States Bankruptcy Court for the Eastern District of New York, which automatically stayed the state court litigation. The State moved successfully in the bankruptcy court to vacate the stay. The bankruptcy court order, however, also prohibited the State from enforcing any favorable state court judgment absent a further order from the bankruptcy court. The state court trial resumed, progressing even more slowly than before. Post-trial briefs were finally submitted in late April 1982.

Although never formally notified, Flushing had been aware of the State's summary dispossess proceedings since at least December 1981. Flushing sought no involvement of any kind, however, until March 1982. At that time it sued the State for declaratory and monetary relief pursuant to the buy-back provision of Cosmopolitan's lease. At no time during this critical period did Flushing assert a right to possession of the premises either in this action or in the underlying possession proceeding. The State removed Flushing's action to the bankruptcy court where the suit has remained dormant.

The state trial court handed down its decision in the summary proceeding in May 1982. Finding that Cosmopolitan had failed to cure eight material defaults under the lease—only one of which related to nonpayment of rent—the court held that the lease had terminated on September 5, 1979 and that Cosmopolitan had thereafter wrongfully remained in possession. Final judgment was entered on June 2, 1982 adjudging the State to be entitled to possession, ordering the issuance of a warrant of eviction against Cosmopolitan, its personnel and affiliates and awarding the State $176,426.44 but not precluding it from seeking any additional amounts later found to be owing.

Armed with its unequivocal state court judgment, the State returned to the bankruptcy court on June 3, 1982 seeking to have Cosmopolitan liquidated, to have the proceeding converted from a Chapter 11 to a Chapter 7 action and to have a trustee appointed to oversee the liquidation, to conduct an audit and to restore possession to the State. By order dated June 24, the bankruptcy court appointed an operating trustee but, on Flushing's request, refused to convert the action. Flushing informed the court that it was engaged in negotiating a potential refinancing deal with Cosmopolitan.

On or about June 12, 1982, with the trustee's approval, Cosmopolitan appealed the trial court decision to the New York Supreme Court, Appellate Term. While aware of the appeal, Flushing did not attempt to intervene during the ten month period of the appeal's pendency.

In November 1982, the bankruptcy court *sua sponte* issued an order to show cause why it should not convert the Chapter 11 proceeding to a Chapter 7 proceeding or dismiss pursuant to 11 U.S.C. § 1112(b) (1982). At

the January 25, 1983 hearing, Cosmopolitan and the trustee argued that the bankruptcy court should not act until the appellate term decided Cosmopolitan's appeal. The bankruptcy court acquiesced but also ordered that a rehabilitation or liquidation plan be filed by March 1, 1983. The court acknowledged that the lease, if reinstated, would constitute a valuable asset. But it was becoming increasingly evident that even with the lease, Cosmopolitan would be in very dire financial straits.

In April 1983, the appellate term affirmed the trial court judgment and Cosmopolitan appealed to the New York Supreme Court, Appellate Division. In early November 1983, the trustee informed the bankruptcy court that Cosmopolitan was unable to meet its current operating expenses, incapable of settling its pre-petition obligations and incapable of curing its defaults—even if the lease was resurrected. A full evidentiary hearing was held in the bankruptcy court on December 12, 1983, approximately two and one-half years after Cosmopolitan filed its petition and a year and one-half after the State filed its initial motion to convert. Flushing participated, appearing through one of its attorneys, and urged the court to again forestall action and to await the imminent decision of the appellate division, hinting that Flushing might be interested in putting together a plan with Cosmopolitan if the lease was reinstated.

It became clear at the December 12 hearing, if indeed it had not been before, that Cosmopolitan had failed to seriously attempt to rehabilitate, despite a time frame that had been extended well beyond the norm. Moreover, it was obvious that, even given the opportunity, Cosmopolitan could not cure its lease defaults. Furthermore, testimony revealed a veritable web of closely related corpora-

tions as well as some plainly suspicious corporate shuffling, including the transfer of certain operations to a newly created Delaware corporation owned and controlled by Peter Garrambone, who with George Garrambone owned and controlled Cosmopolitan and its affiliates. Evasive testimony and oblique legal arguments combined to imbue the transcript with a palpable aura of bad faith.

From the bench at the close of argument in the bankruptcy court, the court ordered that Cosmopolitan be continued as a Chapter 11 debtor, that operations cease the following day, December 13, and that the trustee take all steps necessary to liquidate the company and to marshal the assets. Considerations of time and money dictated the court's decision not to convert the proceeding to a Chapter 7. Conversion, which would have required the appointment of a new trustee, would have produced further delays and would have placed an additional drain on the estate's remaining assets.

The judge's written order, filed December 22, 1983, reiterated the state court holding that the lease had expired on September 5, 1979 and stated that, in any event, Cosmopolitan could not cure its substantial defaults and was not reasonably likely to rehabilitate. The court ordered the estate continued for the sole purpose of liquidating its assets and not for the purpose of continuing the debtor as an operating entity. It ordered that Cosmopolitan's business operations should cease on December 13.

The bankruptcy court's December 1983 order was never appealed. In fact it seems to have been completely ignored. When we heard oral argument in this case on January 23, 1985, Cosmopolitan was still operating at Republic Airport.

The trustee exhibited no discernable inclination to liquidate Cosmopolitan. In late February 1984, the State applied for an order to compel the trustee to at least halt Cosmopolitan's commercial flight operations. At about the same time, the appellate division affirmed the judgment holding that the lease had expired. At the suggestion of the bankruptcy court, the State moved to completely vacate the modified stay and obtain possession. Because the motion addressed only the State's right to possession, Flushing was not served. Flushing's attorney concedes, however, that Flushing had actual notice.

At the hearing on March 15, the court expressed its displeasure with the trustee's performance, characterized the entire proceeding as an abuse of process and made clear its intention to finally end the litigation. By an unfortunate twist of fate, the court signed Cosmopolitan's rather than the State's proposed order, vacating the stay but sending the parties back to litigate in the state courts.

The State applied for resettlement, urging the court to order the trustee to surrender the premises directly to the State. Describing the action as "tantamount to excessive, vexatious litigation," J. App. at 169, the bankruptcy court granted the State's application and, by order dated April 10, 1984, directed that possession of the premises be turned over to the State no later than April 20, 1984. The court refused to stay its order pending appeal. Flushing had actual notice of the court's determination prior to final entry of the order but it entered no objection.

Cosmopolitan alone filed a notcie of appeal from the April 10 order. Purporting to represent the interests of the trustee and Flushing as well as its own, Cosmopolitan

sought a stay on the ground that it was seeking to appeal the state court decision to the New York Court of Appeals. Expressing grave misgivings as to Cosmopolitan's standing to appeal and a strong suspicion of bad faith, Judge Mishler, by order dated April 16, 1984, stayed the bankruptcy court order. Judge Mishler's order was specifically conditioned on the deposit of $100,000 on behalf of Cosmopolitan to cover post-petition rent due as well as any damages, costs and attorneys' fees that might later be "assessed against Cosmopolitan and its attorneys pursuant to 28 U.S.C. § 1927 upon a determination that Cosmopolitan has engaged in dilatory or vexatious litigation in this matter." J. App. at 537-38.

On April 27, the State asked the district court to modify its order to halt the flight operations of Cosmopolitan and its affiliated companies. Reiterating its doubts about Cosmopolitan's standing, the court again expressed its uneasiness with the proceedings generally, noting that the action appeared to be a misuse of the bankruptcy court. Standing by its decision to maintain the status quo, however, the district court refused to halt the unauthorized flights. The court concluded that the State had failed to show either irreparable harm or that the balance of hardships tipped in its direction. We affirmed the May 23, 1984 ruling by unpublished order. *In re Cosmopolitan Aviation Corp.*, No. 84-5037 (2d Cir. July 19, 1984). Meanwhile, on May 16, the appellate division had granted Cosmopolitan leave to appeal to the New York Court of Appeals.

Several months earlier, Flushing had begun a somewhat curious and certainly belated campaign to collaterally attack the bankruptcy court's liquidation order. In December 1983, Flushing moved in the appellate division

to intervene in Cosmopolitan's appeal claiming that as an interested party its rights could be adversely affected by the June 1982 state district court judgment. The appellate division denied Flushing's application. In March 1984, Flushing moved to intervene in the state district court to set aside the June 1982 judgment. That application was denied in May 1984. Flushing appealed to the appellate term and that appeal is apparently still pending. Flushing then moved to intervene before the New York Court of Appeals where Cosmopolitan's appeal was awaiting decision. In July 1984, that application was also denied.

In November 1984, the New York Court of Appeals affirmed the June 1982 judgment of the state district court. By order to show cause, the State requested vacatur of the federal district court's April 16 stay. When Flushing and Cosmopolitan appeared before the district court on December 7, 1984, Flushing for the first time claimed a right to possession of the premises and alleged that its appeal then pending before the appellate term could ultimately result in a reversal of the June 1982 decision and the revival of the lease. Unconvinced, Judge Mishler by order dated that same day affirmed the April 10 order of the bankruptcy court, dismissed Cosmopolitan's appeal and ordered Cosmopolitan and all other parties claiming a right to possession to turn over possession on or before December 14, 1984.

Cosmopolitan filed its notice of appeal of Judge Mishler's order on December 12, 1984. It also moved to stay enforcement of the district court order pending appeal. Flushing did not at that time file a notice of appeal. It did, however, file a motion to intervene in the district court which Judge Altimari granted on December 14. Both

Cosmopolitan and Flushing appeared before us to argue for a stay. We, mistakenly as it turns out, granted a stay on December 20, 1984 and expedited the appeal.

On January 18, 1985, Flushing filed a notice of appeal of Judge Mishler's December 7 order. It also filed a motion seeking an extension of time in which to file a notice of appeal pursuant to Fed. R. App. P. 4(a)(5). Judge Altimari granted the motion and the State immediately appealed. That appeal was also expedited and consolidated with Cosmopolitan and Flushing's appeal.

We heard argument on January 23. Relying completely on Flushing, Cosmopolitan neither submitted a separate brief nor favored us with an oral presentation. Indeed, counsel for Cosmopolitan was totally unprepared to respond to our questions. At the close of argument, we vacated our previous stay of the December 7 district court order. We also directed the parties to file supplemental briefs addressing both the extent of our power to award sanctions against Cosmopolitan, Flushing and their attorneys for bad faith litigation and the best method for calculating the amount.

Discussion

For the reasons articulated below, we dismiss Cosmopolitan's appeal for lack of standing and we dismiss Flushing's appeal for failure to file a timely notice of appeal. Having determined that we lack jurisdiction to decide the merits of this case, we address them solely to explain why we believe that sanctions against Cosmopolitan, Flushing and their attorneys are appropriate. *See Hastings* v. *Maine-Endwell Central School District*, 676 F.2d 893, 897-98 (2d Cir. 1982).

A. *Cosmopolitan's Lack of Standing*

The Bankruptcy Code of 1978, 11 U.S.C. § 101 *et seq.* (1982 & Supp. I 1983), does not contain an explicit limitation on appellate standing. Thus, relying on pre-Code law, a number of courts have adopted a standard that requires an appellant to show that he is a "person aggrieved," that he is "directly and adversely affected pecuniarily by" the challenged order of the bankruptcy court. *In re Fondiller*, 707 F.2d 441, 442, 443 (9th Cir. 1983); *In re Goodwin's Discount Furniture*, 16 B.R. 885, 888-89 (Bkrtcy. App. 1st Cir. 1982); *In re Jewel Terrace Corp.*, 10 B.R. 1008, 1011 n.3 (E.D.N.Y. 1981); *see also* 1 Collier on Bankruptcy ¶ 3.03[5] at 3-118 to -119 (15th ed. 1985). We believe that this rule sets a reasonable and practical threshold for standing and we join the courts that have adopted it.

Under this rule, Cosmopolitan clearly lacks standing to appeal the December 7 order of the district court affirming the April 10 order of the bankruptcy court which directed the liquidating trustee to turn over possession to the State. The impact on Cosmopolitan of the order appealed from must be evaluated in light of the December 1983 bankruptcy court order. The latter order, which was never appealed, in essence stated that the outcome of Cosmopolitan's state court appeals was immaterial given Cosmopolitan's dismal economic position. According to the bankruptcy court's unchallenged reasoning, even if some state appellate court ruled in Cosmopolitan's favor, Cosmopolitan's position would not be improved because the corporation could not cure its defaults. Further, the court found, and no one may now dispute, that Cosmopolitan was hopelessly insolvent with no likelihood of rehabilitation. Cosmopolitan's continued existence and

operation was in complete derogation of the bankruptcy court's liquidation order.

We must also consider the New York Court of Appeals' November 1984 affirmance of the judgment which held that the lease had expired in September 1979. In light of the foregoing, Cosmopolitan has not shown, indeed could not show, that it had any right of possession as of April 1984. Therefore, Cosmopolitan was not directly and adversely affected pecuniarily by the April 10 bankruptcy court order or by the December 7 district court order. Accordingly, we dismiss Cosmopolitan's appeal for lack of standing.

B. *Flushing's Failure to File a Timely Notice of Appeal*

Under Fed. R. App. P. 4(a)(1), a notice of appeal in a civil case, except where the United States is a party, must be filed within thirty days after entry of the judgment or order from which appeal is taken. This time limit is "mandatory and jurisdictional." *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982); *Browder* v. *Director, Department of Corrections of Illinois*, 434 U.S. 257, 264 (1978); *United States* v. *Robinson*, 361 U.S. 220, 224 (1960); *Stirling* v. *Chemical Bank*, 511 F.2d 1030, 1031 (2d Cir. 1975); *see also Guido* v. *Ball*, 367 F.2d 882, 882-83 (2d Cir. 1966). This limitation is applicable to appeals involving bankruptcy orders. Fed. R. App. P. 4 advisory committee notes; 9 Moore's Federal Practice ¶ 204.08[2] at 4-32 (2d ed. 1985). The rule is not as draconian as it first appears: "The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)." Fed. R. App. P. 4(a)(5).

The good cause standard applies to requests for extensions filed prior to the expiration of the initial thirty days. To procure an extension after those first thirty days, the movant must show excusable neglect. Fed. R. App. P. 4 advisory committee notes; 9 Moore's Federal Practice ¶ 204.13 [1.-1] at 4-89. The excusable neglect standard was intended to be a strict one, and to meet it, the moving party must show unique and compelling circumstances. *Fase* v. *Seafarers Welfare & Pension Plan*, 574 F.2d 72, 76 (2d Cir. 1978). Mindful of the purpose of the rules of appellate procedure "to bring litigation to an end and to discourage dilatory tactics," *In re Orbitec Corp.*, 520 F.2d 358, 362 (2d Cir. 1975), courts should find excusable neglect only in the most extraordinary and unusal situations. *State of Oregon* v. *Champion International Corp.*, 680 F.2d 1300, 1301 (9th Cir. 1982); *Airline Pilots* v. *Executive Airlines*, 569 F.2d 1174, 1175 (1st Cir. 1978).

As a general rule, we accord great deference to a district court's finding of excusable neglect. *Fase*, 574 F.2d at 77. We will overturn an extension granted under Rule 4(a)(5) only for abuse of discretion. *Chipser* v. *Kohlmeyer & Co.*, 600 F.2d 1061, 1063 (5th Cir. 1979); *In re Estate of Butler's Tire & Battery Co.*, 592 F.2d 1028, 1032 (9th Cir. 1979); *Gooch* v. *Skelly Oil Co.*, 493 F.2d 366, 368 (10th Cir.), *cert. denied*, 419 U.S. 997 (1974); *see also Mennen Co.* v. *Gillette Co.*, 719 F.2d 568, 571 (2d Cir. 1983).

The excusable neglect standard will generally be satisfied where a party acting in good faith was entitled to and did rely on actions of the district court or its officers and consequently misses the Rule 4 deadline. *E.g.*, *Mennen Co.*, 719 F.2d at 571. Similarly, given the appropriate

circumstances, failure to hear that judgment has entered may be the basis for a finding of excusable neglect, as may uncontrollable delays in mail delivery, unpredictable events affecting the feasibility of appeal and plausible misconstructions but not mere ignorance of the law or rules. 9 Moore's Federal Practice ¶ 204.13[1.-3] at 4-94 to -97.

In support of its request for an extension, Flushing presented two arguments to the district court. First, Flushing's attorney claimed that he believed that United States District Judge Altimari's December 14 order, permitting Flushing to intervene, constituted leave to intervene in Cosmopolitan's appeal which was already before us. Thus, he claimed, he thought it was unnecessary for Flushing to file a separate notice of appeal. He further informs us that it would be inequitable for us to dismiss Flushing as an appellant because he, his associates and Flushing have devoted so much time to this appeal. Second, Flushing argued that it should be entitled to fourteen additional days under Rule 4(a)(3) because Cosmopolitan filed a notice of appeal.

Not surprisingly, Flushing was unable to support these arguments. We find it implausible that experienced counsel could actually believe that the district court has authority to allow a person to intervene in an appeal pending before the court of appeals. Neither can we accept that experienced trial counsel did not realize that every appellant must file its own notice of appeal.

Flushing's second argument is tantamount to a direct affront. The language of Rule 4(a)(3) could hardly be more clear:

> If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

The fourteen day period following the date on which Cosmopolitan filed its notice of appeal ended on December 26, 1984. The thirty day period following entry of the order appealed from ended on January 7, 1985. Flushing filed its notice of appeal on Janaury 18.

The excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules. Flushing did not establish excusable neglect. Thus there was no basis on which the district court could grant an extension pursuant to Rule 4. The order granting Flushing an extension is reversed for abuse of discretion.[2] Consequently, Flushing has not filed a timely notice of appeal and we are, therefore, without jurisdiction to decide the merits of its appeal. We must dismiss.

C. *The Merits*

We reemphasize that our sole reason for discussing the merits—or lack thereof—is to make clear the underpinning of our decision to award sanctions. Our foray is accordingly brief.

We note at the outset that our December 20 stay in no way should be considered a justification for Cosmopoli-

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[2] We can well appreciate what we assume was Judge Altimari's motivation in granting Flushing's motion for an extension. Cognizant that briefs had been filed and that oral argument was only days away, Judge Altimari no doubt sought to avoid the potential risk of further complicating or delaying this litigation.

tan and Flushing's continued prosecution of this appeal. We believe that an objective review of the record reasonably and unequivocally suggests that the stay would not have been granted had Cosmopolitan and particularly Flushing not completely obfuscated the factual and legal issues. The unnecessary complexity created by Flushing, Cosmopolitan and their attorneys, augmented by mischaracterizations and omissions, misled the panel that granted the stay. We will not permit the wrongdoers to profit from their contemptible conduct. The December 20 stay cannot buffer them from the consequences of their bad faith.

As previously noted, all of the arguments on appeal were advanced by Flushing; Cosmopolitan simply joined with Flushing. The first claim, which actually also underlies the remaining arguments, is that Flushing has a right of possession in the premises. Flushing maintains that some state court may yet allow it to intervene in the state court proceeding against Cosmopolitan and that the state courts might then overturn the now venerable ruling, affirmed by the New York Court of Appeals, that the lease expired on September 5, 1979. Flushing's right, as a secured creditor, to participate in a holdover proceeding for possession is dubious at best—even if one ignores Flushing's utter lack of response to the notice of default. Nevertheless, if allowed to intervene, Flushing alleges, it will be able to exercise its right of redemption under New York law, cure the lease defaults and assume possession of the premises or sell the lease. Disregarding for the sake of discussion the mindboggling odds against the lease being reinstated, we note that Flushing has neither a right of redemption [illegible]—unless it has a time machine —the ability to cure the lease defaults.

Under the mortgage and assignment between Cosmopolitan and Flushing, Flushing was entitled to possession only on satisfaction of certain conditions. After receiving a copy of the notice of default, Flushing gave no indication to the State that it had any interest in curing Cosmopolitan's defaults. Any inchoate right to possession which Flushing may once have had has long since expired.

The state right of redemption to which Flushing alludes is not available under the circumstances of this case. Flushing concedes that the right alleged, which derives from N.Y. Real Prop. Acts. Law § 751 (McKinney 1979), belongs to Cosmopolitan, not to Flushing, and arises by its terms only in summary proceedings for nonpayment of rent. Flushing's characterization of the State's summary proceedings as "in essence a nonpayment proceeding," Br. of Intervenor-Appellant at 21, is pure fabrication. Of the eight material defaults which the trial court identified, only one concerned nonpayment of rent.

Moreover, section 751 explicitly applies only before a warrant is issued. Flushing attempts to circumvent this limitation by arguing that the issuance of the warrant violated the August 21, 1981 bankruptcy court order and, therefore, was invalid. Even if Flushing had raised this argument below, instead of for the first time in this appeal, the argument would be unavailing. Under N.Y. Real Prop. Acts. Law § 749, the state court was required to issue the warrant at the time it issued final judgment for the State. Further, the August 21, 1981 order of the bankruptcy court merely precluded the State from actually executing on a favorable judgment without the approval of the bankruptcy court. The State and the state court were in compliance with the August 21 order. Cosmopolitan's repeated, bold defiance of court orders lends

a certain irony to Flushing's argument. Flushing's redemption claim is completely frivolous.

Flushing's second major theme posits that the bankruptcy court abused its discretion in ordering Cosmopolitan to turn over possession to the State. This argument rests on alternative grounds. First, Flushing claims that the bankruptcy court could not issue the order pursuant to 11 U.S.C. § 105(a) (1982) because 28 U.S.C. § 1481 (1982), *omitted by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 113, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 343, prohibits the bankruptcy court from enjoining another court. The State aptly described this argument as bizarre. The April 10 order does not purport by its terms to enjoin any court. And Flushing has failed to show that the effect, nonetheless, is injunctive. Second, Flushing cites case law to support the proposition that an order awarding possession of leased premises to the landlord should only be granted pursuant to 11 U.S.C. § 105(a) under the most extraordinary and compelling circumstances. We have no trouble accepting this proposition for the sake of argument. But we fail to see how it aids Flushing's cause. By the time the April 10 order was filed, the New York courts at every level had agreed that the lease expired on September 7, 1979; Cosmopolitan had been ordered liquidated and adjudged incapable of rehabilitation and of curing its defaults; Flushing had been aware of or involved in the proceedings at all stages, beginning with the State's notice of default; Cosmopolitan had refused to cease operations or, indeed, to comply with any of the orders issued by the courts and the bankruptcy court had expressed its belief that the entire proceeding constituted an abuse of process. These circumstances certainly appear to us to be extraordinary and compelling.

Flushing's final argument [3] is that it has been deprived of an interest in real property. Specifically, Flushing claims that the bankruptcy court violated its due process rights because Flushing was not made a party to the motion which led to the April 10 order. We note first that Flushing has been unable to convince any court so far that it has a possessory interest in the premises. Flushing is still batting zero. At most, and we do not decide this question, Flushing could be entitled to a monetary settlement under the buy-back provision of the expired lease. This right, assuming it exists, is in no way diminished by the April 10 order. Moreover, Flushing had actual notice of and participated in the relevant bankruptcy and district court proceedings. Based on fabrication and fantasy, Flushing's due process arguments evaporate when exposed to the light of reason.

D. *Sanctions*

Our power to award sanctions in this case derives from several sources. Fed. R. App. P. 38 permits us in our discretion to award damages and double costs for the prosecution of a frivolous appeal. The advisory committee note to the rule explains that damages in such a case should be awarded "as a matter of justice to the appellee and as a penalty against appellant." Similarly, 28 U.S.C. § 1912 (1982) gives us the discretion to award to a prevailing party damages for delay and double costs. Under 28 U.S.C. § 1927 (1982), "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and at-

[3] There are actually a few more but they are equally meritless. We think our actions are sufficiently supported; we hesitate to assault the reader further.

torneys' fees reasonably incurred because of such conduct." Finally, where a losing litigant has acted vexatiously or in bad faith, it is within our inherent powers to award attorneys' fees. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 258-59 (1975). And if we find willful abuse of process, we may exercise our inherent power to assess attorneys' fees against counsel. *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 766 (1980).

The appeal brought by Cosmopolitan and Flushing is entirely frivolous. It can only have been brought for the purpose of delay. Cosmopolitan, Flushing and their attorneys have acted vexatiously and in bad faith. The attorneys representing Cosmopolitan and Flushing have unreasonably multiplied the proceedings in this case and are guilty of willful abuse of process. The parties and their attorneys should be penalized for unnecessarily wasting our time and resources and the State should be compensated for having been put to the expense of answering these wholly frivolous appeals. *Fluoro Electric Corp.* v. *Branford Associates*, 489 F.2d 320, 326 (2d Cir. 1973). This Court has been used, as were the bankruptcy court and the district court, to frustrate the rights of the State and the execution of a state court judgment. *Cf. Overmyer* v. *Fidelity & Deposit Co. of Maryland*, 554 F.2d 539, 543 (2d Cir. 1977) (double costs and attorneys fees assessed for using court to frustrate collection of state court judgment).

We assess double costs against Cosmopolitan and Flushing. We award reasonable attorneys fees against Cosmopolitan, Flushing and their attorneys. We remand this case to the district court and instruct that court to determine the attorneys' fees reasonably incurred by the State in this appeal and to assess that amount jointly

and severally against Flushing and its attorneys and jointly and severally against Cosmopolitan and its attorneys.

The appeal of Judge Mishler's order is dismissed as to both Cosmopolitan and Flushing. Judge Altimari's order extending the time for Flushing to file a notice of appeal is reversed. The State is awarded double costs and attorneys' fees and the case is remanded to the district court for the calculation of sanctions. Nothing in this opinion should be interpreted to preclude the State from moving for nor the district court from awarding attorneys' fees for all of the multitudinous and vexatious proceedings in which Flushing and Cosmopolitan were involved in the federal system.

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APPENDIX "E"

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of June one thousand nine hundred and eighty-five.

Present:
HON. ELLSWORTH A. VANGRAAFEILAND
HON. THOMAS J. MESKILL
HON. RALPH K. WINTER

Circuit Judges,

In Re Cosmopolitan Aviation Corp.,

Debtor.

COSMOPOLITAN AVIATION CORP.,

Debtor-Appellant,

FLUSHING SAVINGS BANK,

Intervenor, Appellee Cross-Appellant,

v.

NEW YORK STATE DEPARTMENT
OF TRANSPORTATION,

Appellee, Appellant Cross-Appellee.

No. 84-5121, 85-5005, 85-5007

A petition for rehearing having been filed herein by Attorney, Jessel Rothman, on his own behalf.

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith
Clerk

APPENDIX "F"

CONCLUSION

31. As is evidenced above, the State has endeavored to set forth a fair and just position with respect to the Court's award of attorney's fees and expenses. The State requests a judgment against Cosmopolitan and its attorneys, jointly and severally, and Flushing and its attorneys, jointly and severally, in the amount of $361,260.55 for attorneys' fees and expenses.***

BARRIE L. GOLDSTEIN

Sworn to before me this
24th day of July, 1985

Frederick Mehlnar
Assistant Attorney General
of the State of New York

APPENDIX "G"

Fees, Double Costs for 'Frivolous' Appeal

Circuit Court Levies Sanctions Against Bank, Corporation

by Alan Kohn

Using harsh language to describe conduct of two appellants and their lawyers, the U.S. Court of Appeals for the Second Circuit has dismissed their appeal with a statement that it considered the merits only to explain its award of counsel fees and double costs against them.

Language used by the Court to describe the conduct of the appellants and their lawyers were "frivolous and vexatious," "combined machinations," "truly remarkable bad faith," "tantamount to a direct affront," "mischaracterizations and omissions," "fabrication and fantasy," "unnecessarily wasting our time" and "willful abuse of process."

Further Sanctions

In returning the appeal to Judge Jacob Mishler in the District Court for the Eastern District of New York to determine counsel fees on the appeal, the Second Circuit stated he was not precluded from awarding counsel fees against Flushing Savings Bank and Cosmopolitan Aviation Corporation for "all of the multitudinous and vexatious proceedings" in which they were involved in the Federal system.

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Judge Meskill emphasized that the "sole reason" for discussing the merits was to "make clear the underpinning of our decision to award sanctions..."

***

In an affidavit filed with the Second Circuit Court, the State claimed it had expended $49,046 in legal time in combating the appeal. Its lawyers were Barrie L. Goldstein and Richard G. Liskov, Assistant Attorney Generals. Flushing Savings Bank's lawyers were Julian Kaplan, Jessel Rothman and Lisa J. Rinaldi, of Mr. Rothman's office in Mineola, L.I. Cosmopolitan was represented by Bruce O. Karp and Abraham Backenroth, of Harvis & Zeichner.